IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas

BRIEF FOR THE PETITIONER

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CITATIONS

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Opinion Below

The opinion of the Court of Civil Appeals (R. 100-111) is not officially reported but is printed in 295 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing petitioner's application for writ of error.

Jurisdiction

The judgment of the Court of Civil Appeals was entered November 1, 1956 (R. 111). A timely motion for rehearing, filed November 14, 1956, was overruled November 28, 1956 (R. 113). Petitioner's application for writ of error to the Supreme Court of Texas, timely filed December 27, 1956 (R. 115) was refused, no reversible error, February 6, 1957, and a timely motion for rehearing on that application was overruled February 27, 1957 (R. 122). The Court of Civil Appeals thus became, in this case, the highest court of the State in which a decision could be had. *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157. Jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1257(3) because the petitioner's cause of action is under the Federal Employers Liability Act, 35 *Stat.* 65, 45 *U.S.C.*, Sections 51 et seq. and because the Court of Civil Appeals has decided a question of substance under that Act not heretofore determined by this Court and decided it in a way probably not in accord with applicable decisions of this Court.

Questions Presented

All of the switching operations of respondent railroad at Houston, Texas were performed by Houston Belt & Terminal Railway Company (R. 41), a corporation affiliated with and partially owned by respondent (R. 39). Petitioner, while engaged in the performance of his duties as an employee of respondent, was injured by the negligence of a switching crew handling the car in which petitioner was working (R. 29, 30). The questions presented are:

1. Whether respondent can exempt itself from liability under the Federal Employers Liability Act, 35 *Stat.* 65,

66, 45 *U.S.C.*, Section 51 et seq., by delegating the performance of its switching operations to a terminal company partially owned and effectively controlled by it.

2. Whether the "necessary operation and effect" of respondent's delegation of its switching operations to Houston Belt & Terminal Railway Company was to defeat "the liability which the statute was designed to enforce" within the meaning of this Court's interpretation of Section 5 of the Federal Employers Liability Act, 35 *Stat.* 66, 45 *U.S.C.*, Section 55, in *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 613.

3. Whether respondent is liable to petitioner for the negligence of a switching crew of a terminal company to which respondent has entrusted the performance of its switching operations, said operations being a portion of its function of transportation, which it is obliged to perform under the Interstate Commerce Act, Section 1, paragraphs (3), (4) and (18), 41 *Stat.* 474, 49 *U.S.C.*, Section 1(3), (4) and (18).

4. Whether the Court of Civil Appeals in this case had the power to reverse the trial court's judgment for petitioner, which was based upon an express jury finding that Houston Belt & Terminal Railway Company was acting as respondent's agent in performing the switching operation in which petitioner was injured. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370.

Statutes Involved

The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 *Stat.* 65, 66, 53 *Stat.* 1404, 45 *U.S.C.*, Sections 51 and 55, and para-

graphs (3), (4) and (18) of Section 1 of the Interstate Commerce Act, 41 *Stat.* 474, 49 *U.S.C.*, Section 1(3), (4) and (18). They are printed in Appendix "A" *infra*, pp. 21-24.

Statement

Petitioner was employed as cook on the private car assigned to respondent's General Manager (R. 21, 22). On March 30, 1949, the car, carrying petitioner and the General Manager among others, returned to Houston from a trip (R. 26). While it was being switched from one track to another in the Union Station at Houston, and while petitioner was engaged in the performance of his duties as a cook, the car was rammed violently into another car and petitioner was severely injured (R. 29). There is no question on appeal about the negligence of the switching crew (R. 13, 16-18).

The switching crew were on the payroll of Houston Belt & Terminal Railway Company (hereinafter referred to as "Belt") (R. 56, 57). Only two excerpts from the contract between respondent and Belt, in force at the time of the accident, were introduced in evidence, one by petitioner (R. 42, 43) and one by respondent (R. 59). Both of these excerpts, including that offered by respondent, were received in evidence over respondent's objections (R. 42, 43, 59). Neither of these excerpts provides for or even mentions the performance by Belt of switching operations for respondent or anyone else.

A new contract between respondent and Belt went into effect June 1, 1950, more than a year after the accident (R. 44). This contract specifically provided for the performance of freight and passenger switching service by

Belt (R. 62, 64) and further provided that all services performed by Belt for its using lines should be performed by Belt as *agent* for the using lines (R. 44, 47). In its opinion granting the application of respondent, Belt and the other using lines for the approval of this contract effective June 1, 1950 (referred to as the 1948 Operating Agreement (R. 44-45)) the Interstate Commerce Commission specifically recited that switching was then being performed by Belt for the proprietary carriers as their agent (R. 46, 48, 51). The Superintendent of Belt testified that the June 1, 1950 contract had made no actual change in the handling of passenger switching at Houston (R. 81), and this testimony was generally confirmed by the President and General Manager of Belt (R. 100).

Petitioner did not consult counsel until more than two years after his accident, and then learned that any action against Belt was barred by the applicable Texas statute of limitations (R. 35-37) but that he could sue his employer within three years from the date of the accident under the Federal Employers Liability Act. Accordingly, he brought this action on March 21, 1952 (R. 37).

The petition in the trial court expressly alleged that respondent was engaged as a common carrier by railroad in commerce between the several states and with foreign nations (R. 2) and that the duties of petitioner in which he was engaged at the time of his injury affected interstate and foreign commerce directly, closely and substantially (R. 3) thus alleging a cause of action under the Federal Employers Liability Act.

Respondent's only defense now material was that Belt acted as an independent contractor in performing switch-

ing operations for respondent, and that respondent was therefore not liable for the negligence of Belt's crew (R. 16-18).

As stated above, there was no evidence of any contract provision whatever, effective at the time of the accident, covering the performance of switching operations, and respondent at no time attempted to introduce any such evidence. There was general testimony, principally by employees of Belt, about the manner in which its operations were carried on (R. 38-41, 52-64, 73, 75-81, 95-100). Petitioner introduced evidence of (a) statements made by respondent in proceedings before the Interstate Commerce Commission in *Houston Belt & Terminal Ry. Co. Control, etc.*, Finance Docket 16592, 275 I.C.C. 289 (R. 45, 47-48), (b) portions of the opinion of the Commission in that case (R. 46, 50-51) and (c) a provision in the contract governing Belt's operations which the Commission approved in that proceeding and placed in effect June 1, 1950 (R. 44, 46-47). The substance and effect of this evidence is as follows:

In the application filed by respondent and others with the Interstate Commerce Commission it is expressly recited under oath (R. 47-48) that the Belt is jointly controlled through stock ownership by respondent and the other stockholding lines. The opinion of the Commission approving the arrangement proposed by respondent expressly recites that the switching service was then being performed under an agreement dated July 1, 1907 by Belt for its proprietary carriers as their *agent* (R. 50-51). The Commission's opinion also recites (R. 62, 64) that under the proposed contract Belt would perform all freight and passenger switching service. The June 1, 1950 con-

tract itself provided (R. 47) that all services performed by Belt for account of the using lines should be performed by Belt as *agent* for the using lines.

The trial court, in accordance with Texas practice, elicited from the jury special findings that, upon the occasion in question, Belt was acting as respondent's "agent" and not as an "independent contractor" (R. 12). On these findings, the trial court entered judgment for petitioner (R. 14-15).

The Court of Civil Appeals, in reversing that judgment and rendering judgment for respondent, held in effect that Belt, as a matter of law, was acting as an independent contractor, and that therefore respondent was not liable for its negligence (R. 111). Upon motion for rehearing, petitioner expressly pointed out (R. 112-113) the errors of the court with respect to the proper application and effect of Sections 1 and 5 of the Federal Employers Liability Act. These same points were repeated in the application for writ of error to the Supreme Court of Texas (R. 115-117).

SUMMARY OF ARGUMENT

A. Respondent was liable to petitioner for injuries suffered by petitioner in the course of his employment as a result of the negligence of those to whom respondent had entrusted the performance of its switching operations, regardless of the exact legal relationship between respondent and the switching crew. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.S. (N.S) 1196, 1199. Respondent could not delegate the performance

of any portion of its functions as a common carrier in such a way as to relieve itself from liability to its own employees. *Restatement of Torts*, Sec. 428.

B. There is no evidence in this record of any contract purporting to make Belt an independent contractor in its performance of switching movements for respondent. But even if there were any such contract in evidence, it would be void as to petitioner and could not relieve respondent of its liability to petitioner for the negligence of those performing its switching operations. 35 *Stat.* 66, 45 *U.S.C.*, Section 55; *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 602, 613.

C. The jury found in response to special issues submitted to it that Belt was respondent's agent and was not acting as an independent contractor in the performance of the switching movement in which petitioner was injured (R. 12). There was evidence to support those findings, and they are conclusive upon this appeal. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 374. Accordingly, respondent is liable for petitioner's injuries, which were found by the jury to be due to the negligence of the switching crew (R. 13).

Argument

I.

Respondent was liable to petitioner for the negligence of the persons to whom it had entrusted the performance of its switching operations, regardless of its exact legal relationship to them.

The performance of switching operations is a part of the function of transportation which respondent is bound

to perform. Section 1 (3), (4) and (18) of the Interstate Commerce Act, 41 *Stat.* 474, 47 *U.S.C.*, Sec. 1 (3), (4) and (18). It has uniformly been held that a common carrier by railroad has no power to delegate the performance of any portion of its function of transportation to others in such a way as to relieve itself of liability, especially liability to its employees and passengers. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 12 L.R.A. (N.S.) 1196, 1199; *G. C. & S. F. Ry. Co. v. Shelton*, 96 Tex. 301, 316-317, 72 S.W. 165; *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 91; *Panhandle & S.F. Ry. Co. v. Crawford* (Tex. Civ. App.), 198 S.W. 1079, 1081; *Peters v. St. Louis, San Francisco Ry. Co.* (Mo. App.), 131 S.W. 917, 921-922; *Atlantic Coast Line Ry. Co. v. Tredway*, 120 Va. 735, 93 S.E. 560, 10 A.L.R. 1411, 1417.

In the *Floody* case the plaintiff was the employee of the Omaha company which operated into and out of a union depot in St. Paul owned and controlled by the Union Depot Company, a separate corporation. While riding on one of defendant's engines plaintiff was injured by the negligent operation of a switch by employees of the Depot Company. Defendant there raised precisely the same question as respondent here. The court disposed of that defense as follows:

> "We are satisfied that, as between the Omaha Company and the plaintiff, the company accepted the services of the switchman on that particular occasion to the same extent as though he had been in its employ.

"Conceding that, under the contract between the Union Depot Company and the Omaha Company, the latter was required to take its trains out of the depot over the switches in the manner directed by the switch tenders in the employ of the Union Depot Company, yet that fact did not discharge the railroad company from the contract relation which it assumed as between itself and plaintiff. *The test of liability is not determined by the fact that the switch tenders were in the employ and under the control of the Union Depot Company, and that, by virtue of the contract between the switchmen and that company, the relation of respondent superior existed.* The Omaha company owed the duty to plaintiff to use all reasonable diligence to carry him safely in its engine out of the depot yards, and it was immaterial to plaintiff whether in so doing defendant operated its train over its own tracks and switches, over the tracks and switches which it had leased from another company, or under a contract with the Union Depot Company. *It was immaterial to plaintiff that the switchmen were paid by the Union Depot Company, and were under its control in operating the switches, if, for the occasion, the Omaha Company chose to avail itself of the services of that company and its employees for the purpose of taking its train out of the depot.*" (Emphasis added) (p. 1199 of 13 L.R.A. (N.S.)).

In the *Shelton case*, a passenger rather than an employee was involved, but we consider the principle indistinguishable. There the plaintiff was a passenger on a train of the Gulf, Colorado & Santa Fe Railway Company, and was injured by the negligence of a switching crew of the Atchison, Topeka & Santa Fe which was switching the Gulf car by virtue of an arrangement between the two companies. The Supreme Court of Texas upheld a judgment for the plaintiff in the following language:

"It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, was employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning their joint business at that station. *Under this state of facts the men of the switching crew were equally the servants of both companies and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it.*" (pp. 316-317, 96 Tex) (Emphasis added).

The general principle involved in this situation is stated as follows in *Restatement of Torts*, Section 428:

"An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to work in carrying on the activity."

Respondent attempts to make the contention, in its brief in opposition to the petition for certiorari (p. 11), that the principle set out above applies only when a common carrier attempts to delegate the performance of a portion

of its functions to some other person or corporation not a common carrier. No basis whatever for such a distinction appears in the cases or is explained by respondent. No such distinction exists.

The maintenance of this principle is extremely important for the proper protection of railroad employees in the situation of petitioner. Here petitioner was working on his employer's train when it came into the station at Houston and continued to work on it carrying out the duties of his employment (R. 29). If his injuries had been due to the negligence of the crew which handled the train on its line haul, unquestionably respondent would have been liable. As the Court noted in the *Floody* case, it is immaterial to petitioner that the switchmen were paid by Belt and under its orders, if, for the occasion, respondent chose to avail itself of their services for the purpose of moving its train. In any case, petitioner was injured while in the performance of his duties by the negligence of those who were performing his employer's work. He is clearly entitled to compensation under the Employers Liability Act.

As respondent correctly points out in its brief in opposition to the petition for certiorari (pp. 7-8), there are many places in this country where switching of railroad cars is performed by terminal companies and not by the line haul carriers. If this Court holds that petitioner was not covered by the Act under the circumstances of this case, it will necessarily hold that any employee of a line haul carrier, while engaged in the performance of his employer's business on a car which is being switched by the employees of another corporation, has no claim under the Act if he is injured by the negligence of persons performing the

switching. Instead, he will be relegated to an action for damages under State law against a third party, subject to defenses not available under the Act, and frequently governed by a different statute of limitations. Respondent points to nothing, and obviously can point to nothing, in the legislative history of the Act which fairly indicates that Congress in enacting this legislation had any intention of so limiting or circumscribing the rights which railroad employees had before the Act, as illustrated in the *Floody* case.

Respondent's whole argument about the proper interpretation of the Act, as set out in its brief in opposition to the petition for certiorari, revolves around those cases, such as *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, and *Hull v. Philadelphia & Reading Ry. Co.*, 252 U.S. 475, which hold that in order to be entitled to the protection of the Act, a person must be an "employee" of a carrier. The basis of decision in those cases has no application whatever to the present case. They were concerned solely with the question of whether the particular plaintiffs involved were employees of the defendants and therefore entitled to the protection of the Act. Here there is no such question, since petitioner is unquestionably respondent's employee. While the Act makes the employer liable only to his "employee", it makes the employer responsible for the negligence of any of his "officers, agents or employees". This last phrase is couched in language as broad as Congress could have employed to designate any one for whose actions the employer was legally liable. Under the facts of this case, the switching crew of the Belt were (as the jury found) "agents" of the respondent.

In fact, the opinion in the *Robinson* case clearly illustrates the distinction which we are making. After stating the case and quoting the relevant provisions of the Act the Court there wrote as follows:

> "The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the act is a liability to the 'employees' of the carrier and not to others; and the plaintiff was not entitled to the benefit of the provisions unless he was 'employed' by the railroad company within the meaning of the act. It will be observed that the question is not whether the railroad company by virtue of its duty to passengers, of which it cannot devest itself by any arrangement with the sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety. . . ." (237 U.S. 91).

Thus the Court very clearly stated that the only issue with which it was concerned was whether or not the plaintiff Pullman porter was "employed" by the railroad company and therefore entitled to the protection of the Act. It held that he was not. But it expressly recognized that the decision of that question did not control the question whether the railroad company might be liable to third parties for some act of his. The Court thus was not and could not have been deciding in the *Robinson* case, or in any of the similar cases cited by respondent, the question presented in this case, and none of the authorities cited by petitioner here has been "discredited".

II.

No contract between respondent and Belt could relieve respondent of its liability to petitioner for injuries suffered in the course of his employment.

The court below stated in its opinion that the switching crew here was switching "the plaintiff's car pursuant to a contract . . . which purported to make the Belt an independent contractor . . . while switching cars, including the plaintiff's car . . ." (295 S.W. 2d 508, 509). This statement is patently incorrect. No contract is in evidence which purported to make Belt an independent contractor while performing switching operations. But if any such contract had been in evidence, it would have been void as to petitioner under the plain terms of Section 5 of the Employers Liability Act (35 Stat. 66, 45 *U.S.C.*, Sec. 55) which reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: . . ."

If respondent had performed its own switching of passenger cars at Houston with its own crews, there would have been no question of its liability to petitioner for his injuries. It may have good and sufficient business reasons, as suggested by the witness Magee (R. 79) for using Belt's switching crews. However, neither the motives of the respondent in entering into such an arrangement, nor the powers of respondent and Belt under State law to make such a contract, can have any effect upon petitioner's rights here. To give the arrangement the force which re-

spondent claims for it would deprive petitioner of his rights under the Act and would give him in substitution therefor merely a common law action for damages against a third party, subject to defenses not available under the Act and governed by a different and shorter statute of limitations. We think it clear that Congress expressly intended that no such result should be possible, and that the above quoted provision of the statute is effective to prevent it.

Section 5 has been the subject of relatively little litigation since its enactment, and so far as we have found the only pertinent previous decision by this Court on this phase of the case is *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 613. There the employer contended that since the agreement being attacked had been made before the effective date of the statute it was not intended to be covered by Section 5 and that its purpose or intent could not have been to enable the carrier to exempt itself from liability. Mr. Justice Hughes, speaking for a unanimous Court, disposed of this contention as follows:

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their neces-

sary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view." (p. 613).

III.

The jury's verdict has foreclosed respondent's defense that Belt was an independent contractor and not its agent.

The jury, in response to special issues submitted to it by the District Court expressly found (R. 12) that Belt was acting as agent for respondent and not as an independent contractor in performing the switching movement in which petitioner was injured, and (R. 13) that the injuries were due to the negligence of the switching crew. Respondent contended on appeal (R. 17) that these findings had no support in the evidence, and the Court of Civil Appeals agreed with that contention (295 S.W. 2d 508, 513). This Court has had occasion in a number of cases during recent terms to emphasize the proper consideration to be given to a jury's verdict in a case under the Employers Liability Act. The case which seems most apposite here, and the only one which we will cite for our present purpose, is *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 374. There, the jury found that the petitioner was a "member of the crew" and therefore entitled to sue under the Jones Act. The judgment based on that verdict had been reversed on appeal, on the theory that the evidence was insufficient to support it. This Court reversed, holding that the question of whether petitioner was a member of the crew was one of fact, that it had properly been left to

the jury, and that since there was some evidence upon which the verdict could have been based, it must stand. Here the question of whether the Belt was respondent's "agent" is fully as much a question of fact as the question before the jury in the *Senko* case.

All of the evidence affecting these issues was presented by witnesses who were officers or employees either of Belt or respondent, and sometimes of both. The jury was privileged to consider, among other things, the demeanor of those witnesses and their interest in shading the facts in a particular manner in determining the weight to be given to their testimony. In addition, it was wholly undisputed that respondent owned 50% of Belt's stock and appointed four of its directors (R. 39, 53) who always voted as a unit and could prevent any affirmative action by Belt's board (R. 87), that respondent reserved the right to demand the discharge of any Belt employee obnoxious to it (R. 42, 43), that respondent insisted that Belt's team tracks should not be open to other railroads in competition with respondent, even though Belt might thereby gain revenue (R. 91-93), that respondent admitted in pleadings filed with the Interstate Commerce Commission that it and the other stockholding lines "jointly controlled" Belt (R. 44, 46, 48), and that respondent, along with the other stockholding lines of Belt, procured a finding from the Interstate Commerce Commission that the relationship between respondent and Belt at the time of the accident to petitioner was one of agency (R. 48, 51) in the face of a vigorous protest by the Texas & New Orleans Railroad Company, one of respondent's competitors (275 I.C.C. 289, 311). Furthermore, the clear import of all of the evidence on this phase of the case is that Belt is nothing more than an instrumentality of respondent and the other

stockholding lines, created to perform switching and terminal operations for them at Houston, and wholly incapable of any independent existence (R. 38-40, 52-54, 64-65). All that the opinion of the court below says, in effect, is that the jury came to the wrong conclusion upon the basis of this evidence. But that is no part of the appellate court's function. Obviously, there was not only some evidence, but quite substantial evidence, to support the jury's verdict, and the court clearly erred in setting aside that verdict and rendering judgment against petitioner. To allow the judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial.

Conclusion

The judgment of the Court of Civil Appeals should be reversed, and that of the District Court (R. 14-15) affirmed.

Respectfully submitted,

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APPENDIX "A"

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (18)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier". The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary

in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio, apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passenger or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carrier subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(18) *Extension or abandonment of lines; certificates required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.